(7)

No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICUS CURIAE* THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE* [1]

The Defense Research Institute (DRI or the Institute) is the largest national organization of lawyers specializing in the defense of civil litigation. The Institute has 17,000 members. They practice in every state. DRI's total constituency consists of some 25,0000 defense trial

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[1] Pursuant to Rule 37, the respondents' letters of consent have been filed with the Clerk of the Court. Petitioner's written consent accompanies this filing.

lawyers through affiliation with the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys, and some sixty state and local defense attorney organizations. DRI members defend clients in civil litigation in countless cases on a day-to-day basis in courtrooms across the nation. The Institute, by its research, publications and public speech, has actively sought to limit the recovery of punitive damages and to establish that constitutional standards exist governing the award of such damages, beginning at least as early as 1969. DRI Monograph, *The Case Against Punitive Damages* (1969); J. Ghiardi and J. Kircher, *Punitive Damages*, § 21.001 (1984). The Institute and its members share a common interest in insuring that awards of punitive damages are fair and just.

SUMMARY OF ARGUMENT

Alabama, like most other states, does not give juries adequate standards for awarding punitive damages. Alabama juries have virtually standardless discretion to impose punitive damages in whatever amounts intuition, caprice, or clever advocacy may suggest. The result is a scheme so lacking in consistency and fairness as to violate due process. The problem is not hypothetical. Recent experience, in Alabama and elsewhere, shows that the law of punitive damages has become the roulette wheel of civil litigation, with plaintiffs encouraged to go for the jackpot and defendants forced to take their chances with financial disaster. No society concerned for fairness and regularity in the administration of justice can afford to tolerate an essentially lawless regime of punishment.

The question is, what to do about it? Although most observers recognize that punitive damages are a problem, few agree on a constitutional remedy. One solution would be to limit punitive damages to some multiple of

compensatory awards. Another solution, which is urged here, would be to require that the states themselves come up with acceptable guidelines for imposing punitive awards. While either solution would work, the latter is more consistent with traditional notions of judicial restraint and settled principles of our Federalism. We therefore urge that this Court hold that due process requires the states to legislate appropriate standards for imposing and constraining punitive damages. Alabama has not done so, and the post-verdict review required by the Alabama Supreme Court is entirely inadequate to this task. The judgment below should therefore be reversed on the ground that the award of punitive damages was not made under a constitutionally acceptable regime of punishment.

ARGUMENT

I. UNGUIDED JURY DISCRETION OVER PUNITIVE DAMAGES VIOLATES DUE PROCESS

It is commonplace to observe that juries are very largely unconstrained in assessing punitive damages. Alabama law is typical. There is no legislative specification of the grounds on which punitive damages may be inflicted nor of the amounts which may be imposed. Neither do jurors have the opportunity to consult experience. Every jury is completely new to the task of punishment. All the jurors know is what they are told by the court, and they are told to do as they please. The Alabama approved pattern jury instruction on punitive damages provides:

> The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. *The imposition of punitive damages is entirely discretionary with the jury.* Should you award punitive damages, in fixing the amount, you

must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs. Alabama Pattern Jury Instructions § 11.03 (1974) (emphasis added).[2]

Following this "guidance", the trial judge instructed the jury in this case as follows:

> Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
>
> This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
>
> Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs. Reporter's Transcript at 897-98.

This instruction gave the jurors nothing concrete to go by. In default of legal guidance or constraint, they simply did as they pleased.

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[2] In Alabama, unlike most states, the problem of punitive damages arises in every wrongful death case. That is because the Alabama Supreme Court has interpreted the state's wrongful death statute, Ala. Code § 6-5-410 (1975), not only as authorizing punitive damages in wrongful death cases but as authorizing *only* punitive damages in wrongful death cases. And this is true even where the liability rests on mere negligence. *Olympia Spa v. Johnson*, 547 So.2d 80, 88 (1989) (Houston, J., concurring in part).

Imagine the outrage if criminal punishment were imposed on this basis. Every judge in America would recognize the unconstitutionality of giving juries unbridled discretion to decide what is criminal, or to select, without guidance or constraint, whatever penalty intuition might suggest. Yet that is precisely what happens every day in punitive damages litigation.

The difference, we are told, is that punitive damages are civil rather than criminal penalties. In one respect, but in one respect only, is this answer sufficient. This Court has determined that the characterization of punishment as civil or criminal is decisive under the Eighth Amendment. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc*, 109 S.Ct. 2909 (1989). A majority of this Court held that, for reasons of history, the provisions of that amendment do not apply to civil penalties.

But while the characterization of punishment as civil or criminal is decisive in the history of the Eighth Amendment, it cannot control—indeed, it is barely relevant to—the due process issue. This Court has never confined the due process guarantee to criminal prosecutions. On the contrary, this Court has said on occasions too numerous to name that due process applies to any legal proceeding that may result in a deprivation of life, liberty, or property. Whatever the context, due process requires that legal procedures be consistent with "fundamental fairness," *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981); that they be consonant with "ordinary notions of fair play and the settled rules of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); and that they not offend "the community's sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952). In short, due process requires that deprivation of life, liberty, or property be done only pursuant to the rule of law, and not by any arbitrary act.

A chief component of this constitutional guarantee is the vagueness doctrine. The vagueness doctrine is not limited to criminal penalties. See *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). This is as it should be. In a constitutional due process analysis, the fundamental distinction is not between civil and criminal punishment, but between punishment—whether civil or criminal—and compensation. Compensation involves only the allocation of existing loss. Punishment is the creation of loss, an intentional infliction of harm by the state. No society that values freedom from official oppression can be indifferent to the terms on which punishment is inflicted by the state. Nor can we afford to dispense with fundamental fairness simply because a punishment is denominated civil rather than criminal.

For both civil and criminal penalties, the heart of the vagueness doctrine is concern for the rule of law[3]—that is, for evenhandedness and regularity in the administration of justice. The risk is that punishment will be imposed for insubstantial, unauthorized, even illegitimate reasons, as a particular judge or jury sees fit. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria for determining the severity of punishment. All of these concerns are implicated by a jury's standardless discretion to award punitive damages in virtually any amount, and they justify searching vagueness review. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86 (1988) (O'Connor, J., with whom Scalia, J., joined, concurring) (the

[3] Vagueness cases often also implicate a related concern for fair warning of prohibited conduct. Recently, however, this Court has affirmed that the need to inhibit arbitrary and capricious law enforcement is in fact the "more important" goal of vagueness review. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

This case squarely raises the claim that the standardless assessment of punitive liability, as authorized in Alabama and elsewhere, violates due process of law. It also raises the claim that the punishment imposed in this case was excessive and disproportionate to any demonstrated fault of this defendant and therefore also violative of due process. These two claims are closely related.[4] In fact, in the context of punitive damages, vagueness and disproportionality are merely different windows on the same problem.[5]

Disproportionality refers to punishment that is grossly excessive in relation to the actor's misconduct, punishment that is so extravagant as to be gratuitous. Disproportionality of punishment is exacerbated by—indeed, it is largely a function of—a lack of meaningful standards for determining severity. That is because disproportionality is usually a relative, rather than an absolute, judgment. Whatever the absolute level of punishment, gross and flagrant departures from the norm are excessive. Especially is this so where such departures are wholly unexplained and are not justified by any rational analysis. Obviously, the lack of meaningful standards for determining the severity of sanctions invites excess of

[4] See Freeman, *Justice Powell's Constitutional Opinions*, 45 Wash. & Lee L. Rev. 411, 443-45 (1988) (comparing the due process approach to punitive damages suggested by Justices O'Connor and Scalia with Justice Powell's opinions in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and reconciling that approach with the proportionality concept vindicated in *Solem v. Helm*, 463 U.S. 277 (1983)).

[5] For an earlier analysis suggesting that proportionality constraints are present in both the Due Process Clause and the Eighth Amendment, reflecting their common origin in the Magna Carta provisions on amercements, see Jeffries, *A Comment On The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

this kind. In other words, standardless punishment is objectionable both in its incidence and in its magnitude. Both the fact and the severity of punishment are suspect when there is no constraint on either.

The facts of this case are illustrative. The wrongdoer here was Lemmie Ruffin. He committed fraud on the plaintiffs and doubtless deserves to be punished. Instead, punishment—a fine of over $1 million—was imposed on the defendant Pacific Mutual Life Insurance Company on a theory of respondeat superior. Thus, Pacific Mutual was punished, and punished severely, for the fraud of its agent. With respect to compensatory damages, this result is unobjectionable. As between the innocent plaintiffs and Pacific Mutual, which gave Mr. Ruffin apparent authority, it is right that the defendant should bear the loss. This kind of reasoning is familiar and persuasive in the context of allocating an existing loss where the real wrongdoer is missing or judgment-proof. But here the jury did not merely allocate an existing loss; they also levied a fine of more than $1 million, not to make good the plaintiff's loss but to punish for supposed wrongdoing. Thus, Pacific Mutual has been punished, and punished severely, for conduct for which it was not directly responsible, for which it had no illicit motive, and from which it could not gain.

Neither retribution nor deterrence justifies this heavy penalty. Retribution makes sense only when there is genuine wrongdoing. Deterrence makes sense when the actor stands to profit from the act. The goal is to increase the expected costs of wrongdoing to offset the expected benefits. Here the defendant had no expected benefits. The punishment was therefore gratuitous in its imposition and extravagant in its amount.

Of course, any penalty, no matter how extravagant, for any act, no matter how trivial, can be linked up somehow to retribution and deterrence. The concepts can be stretched to reach any case. The question, therefore,

is not whether punishment could conceivably be justified under some set of factual assumptions. The question is whether punishment was actually justified in any given case. Under Alabama law, there is simply no way to tell. Each jury is authorized to inflict huge penalties for mere inattention or to impose no penalty for serious wrongdoing, as its members see fit. No explanation is required. No consistency is possible.

Of course, everyone knows that in Alabama, as elsewhere, most instances of mere inattention will not be punished. However, a few instances will be punished, and perhaps quite severely, under the Alabama law of punitive damages. And what are the criteria for selecting those to be punished? None is specified. What are the rules for determining the severity of the sanction? None is stated. What are the limits to the jury's judgment? None is apparent. This is the very definition of arbitrariness. It is exactly the regime condemned by this Court more than a century ago in *United States v. Reese*, 92 U.S. 214, 221 (1876): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." The Alabama law of punitive damages sets a net large enough to catch all possible offenders, and leaves it to a succession of juries to say who should be punished and who should not. They act without guidance, without experience, and without explanation. Whatever may be said of this regime, it does not afford due process of law.

II. THE ALABAMA POST-VERDICT REVIEW DOES NOT CURE THIS DEFICIENCY

The Alabama Supreme Court has not been entirely oblivious to these concerns. In an effort to bring punitive damages under some semblance of legal control, that court has required Alabama trial courts to state on the record their reasons for interfering or for not interfer-

ing with a jury verdict on grounds of the excessiveness of damages. *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). This may be a step in the right direction, but it is a very small step indeed. As a recognition that something must be done, the Alabama post-verdict review is welcome, but as a curative for the standardless discretion afforded Alabama juries, it is altogether inadequate. This is so for three reasons.

First, the post-verdict review does not provide standards for the jury's decision. Nothing in the trial court's consideration of a post-verdict motion for remittitur resolves, or even addresses, the fundamental problem of standardless punishment by the jury. Thus, the first and crucial decision is made, as has been noted, in a wholly arbitrary manner.

Second, the post-verdict review does not authorize judges to supplant juries in assessing punitive damages. On the contrary, the Alabama Supreme Court was careful to say that "no substantial rule of law is changed" and that the trial court may not "substitute its judgment for that of the jury." *Id.* at 1379. Thus, it is clear that the Alabama trial judges were given no new authority to control or restrain improper punitive awards. They were merely told to state on the record their reasons for (not) acting. The principal reason for not acting, of course, is a lack of authority to contradict juror intuition. The arbitrariness of standardless jury judgments remains intact.

Third, the instant case confirms that in practice the Alabama post-verdict review process means very little. In this case, the trial judge dutifully followed *Hammond* in stating on the record his reasons for denying remittitur. This part of the opinion, which is reproduced in the petition for certiorari at pages A14-A17, is worth close attention. The trial judge did not say that the jury had reached a sensible result. In fact, he indicated his disagreement with it. He also did not give any reasons that would justify a punitive award against Pacific

Mutual. The only relevant comment was the judge's inference that Lemmie Ruffin's supervisor had participated in the scam and his comment that "it is highly desirable to discourage others, similarly situated from similar conduct." This reasoning would justify a punitive award against Lemmie Ruffin or against his supervisor personally, but it does not explain why Pacific Mutual should be fined over $1 million. It is plain that both individuals operated in violation of, rather than pursuant to, company policy and that the company had everything to lose and nothing to gain from their behavior. There was *no* discussion of a rationale for awarding punitive damages against Pacific Mutual and *no* explanation of why the jurors decided to do so. Indeed, how could there be? The trial judge had no way of knowing why the jury acted as it did and had no authority to replace its decision with his own. Given those conditions, the post-verdict review turns out to be an exercise in futility. It does not cure the unconstitutionality of the standardless discretion in the Alabama law of punitive damages.

III. AN APPROPRIATE REMEDY FOR THIS CONSTITUTIONAL DEFICIENCY WOULD BE TO REQUIRE STATE LEGISLATURES TO ADOPT SUITABLE GUIDELINES FOR AWARDING PUNITIVE DAMAGES

Excessiveness in the award of punitive damages can be addressed in two ways. The direct approach would simply limit the amount of punitive damages to some multiple of the underlying compensatory award. This approach is relatively straightforward. The compensatory award would be taken as a rough measure of the wrong done. A punitive award would have to bear some relation to that wrong. A sensible and familiar guideline would use a multiple of three. The fact that legislatures, when faced with the analogous question of fixing appropriate penalties, so often choose the multiple of

three suggests that figure as a sensible norm.[6] That is not to say, however, that there is constitutional magic in the number three or that any award greater than treble damages would necessarily be excessive and disproportionate. It is to suggest that a base-line of treble damages would make a sensible place to begin. Larger judgments should be required to have special justification. While that special justification no doubt could be shown in some cases, it is very unlikely that any defensible reasoning could justify awards of 200 or 745 times compensatory damages, as juries have recently awarded in Alabama. See, e.g., *United American Insurance Co. v. Brumley*, 542 So.2d 1231 (Ala. 1989) ($1 million punitive award for failure to pay a $5,000 claim); *Healthamerica v. Menton*, 551 So.2d 235 (Ala. 1989), *cert. denied*, 58 U.S.L.W. 3528 (Feb. 20. 1990) (No. 89-939) (nearly $1.8 million in punitive damages awarded for a claim that apparently did not exceed $2,500).

Moreover, using treble punishment as a rule of thumb for punitive damages is consistent with the origins of punitive damages under English law. While nineteenth century American courts attributed punitive damages to late eighteenth century English cases, Pollock and Maitland tell us that actions for damages were a relatively late development in English law[7] and that punitive damages did not originate in these judicial decisions, but in the earlier legislatively-created devices to supplement the cumbersome scheme of presentments for punishing persons for wrongful conduct. These statutes did not provide for unlimited liability at the discretion of a jury.

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[6] See, e.g., 15 U.S.C. § 15(a) (1982) (antitrust); 18 U.S.C. § 1964(c) (1982) (RICO). Under these provisions, the plaintiff's recovery is three times actual damages.

[7] They define damages as "not a fixed *bot* appointed by law, but a sum of money which the tribunal, having regard to the facts of the particular case, will assess as a proper compensation for the wrong that [the plaintiff] has suffered." 2 F. Pollock and F. Maitland, *The History of English Law*, 522-23 (2d ed. 1909).

Instead, Parliament, implementing the concept of proportionality contained in Magna Carta and subsequent constitutional documents, limited punitive damages to a certain multiple of actual damages, usually double or treble.

The trouble with this solution is not that it would prove ineffective. In fact, a presumptive rule of treble damages would sharply curtail the outrageous abuses of punitive damages that have recently surfaced in Alabama.[8] The problem is not that a rule of treble damages would not work, but that courts have been reluctant to adopt it. The specification of a multiple of treble damages, even as a guideline, looks like a legislative judgment. Court are understandably reluctant to invade the legislative function. Moreover, in this case, the concept of federalism advises caution. Yet while judicial self-restraint is commendable and proper, it is so only so long as it does not result in abdication of the overriding judicial responsibility to ensure due process.

An alternative solution, which we commend to this Court, is not to undertake to specify precisely when punitive damages are permissible and in what amounts, but for this Court to require state legislatures to specify when punitive damages are permissible and in what amounts. It is entirely proper for this Court to defer to any reasonable legislative judgment, but it should require that there be a legislative judgment to defer to. After all, the essential problem in the law of punitive damages today is not that state legislatures have made unreasonable judgments. It is that they have made no judgments. The crucial problem is precisely the absence of *any* consistent standard as to when punishment is warranted and in what amount. The problem, in short,

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[8] See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), vacated and remanded, 475 U.S. 813 (1986), on remand, 505 So.2d 1050 (Ala. 1987).

is standardless punishment. And the obvious cure is to require that standards be set.

This remedy is supported by the due process requirement of prior notice. Some commentators have observed that in certain situations not only is prior notice required, but it is to be given only by an exercise of *legislative* power, whether through a statute or in agency rules adopted pursuant to a statute that contains adequate guidelines for their promulgation. See, e.g., Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 583-84 (1972) (predicting the continued viability of the delegation doctrine and observing that, "[a]t its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body"); Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 202-05 (1985).

Due process concerns over the absence or inadequacy of legislative guidelines were voiced by Justices last Term in the contexts of a jury award of punitive damages under state law and a claim for "civil" treble damages under the Racketeering Influenced and Corrupt Organizations Act (RICO). In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), several Justices noted the seriousness of the due process "void for vagueness" questions present in those cases but not raised by the parties.[9] There is also a heightened concern where *juries* are not given adequate statutory guidance. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (finding "no justification for allowing awards of punitive damages" where "jury discretion over the amounts awarded is limited only by the gentle rule that they not

[9] Those arguments are analyzed in Freeman and McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 Bus. Law 1003 (1990).

be excessive"). Thus, in *Browning-Ferris*, Justice Brennan stated in concurrence, 109 S.Ct. 2923:

> I join in the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties . . . I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits . . . [Here] the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think best.

Justice O'Connor, concurring and dissenting in part, added: "I adhere to my [comments in a previous opinion] regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.* at 2924.

The prior notice concerns inherent in both the delegation doctrine and the vagueness doctrine reflect an emphasis upon the legislative branch's core responsibility. In each doctrine, the underlying impulse behind the prior notice requirement is that the lawmaking power be kept in the hands of the legislature in order to avoid ad hoc and arbitrary decisionmaking.

Thus, we urge that this Court declare that civil punishment cannot be imposed in the wholly standardless and ad hoc manner authorized by the Alabama law of punitive damages. We would not declare that punitive damages are unconstitutional. Rather, we would remit the issue to the legislature of Alabama for articulation of appropriate standards for imposing this sort of punishment. The legislature would then have the opportunity to specify criteria for imposing punitive liability and for determining the amount of punitive awards. As the facts of this case suggest, one of the crucial issues

would be whether massive punitive liability can be based on respondeat superior or whether the defendant punished must be directly at fault. Another issue would be whether punitive liability should presumptively bear some relation to the amount of compensatory award. These and other issues can and should be addressed by legislation, and not left to the unaided intuition of a succession of juries.

It is important to note that this proposal is not unusual. Rather, it reflects this Court's traditional approach to the problem of standardless punishment. In analogous situations, this Court has invalidated legal regimes that authorized lawless punishment and allowed legislatures to replace them with schemes of guided discretion. Two examples should suffice.

The most obvious example is the ordinary case of an unconstitutionally vague criminal statute. In such cases, this Court strikes down the vague statute and invites the legislature to replace it with a more narrowly drawn law. A good example is the vagrancy law invalidated in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Such statutes punished anything and everything. They were commonly used by local police to sweep the streets of undesirables. See Foot, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956). Not surprisingly, some persons were deemed undesirable for wholly illegitimate reasons—as, for example, in Papachristou where interracial couples were arrested for riding in an open car down the main thoroughfare of Jacksonville. The invalidation of vagrancy laws invited legislatures to respond with more narrowly drawn statutes, which they did. The more modern laws have not entirely resolved the problem of abusive or discriminatory enforcement, but they are indisputably and incomparably better than the old catch-all vagrancy statutes.

A more precise and informative analogy comes from this Court's cases on the death penalty. The claim that the death penalty is always cruel and unusual under the Eighth Amendment was rejected, although by a divided Court. *Furman v. Georgia*, 408 U.S. 238 (1972). The Court, however, was deeply troubled by the lack of meaningful legislative standards for imposing the capital sanction. The problems identified then in the administration of the death penalty are very similar to problems identified now in the law of punitive damages—arbitrary and capricious punishment, imposed randomly and freakishly, under exceedingly vague standards, with a resulting lack of consistency and equality in the administration of the law. The Court's response was to invalidate open-ended death penalty statutes and to require standards and procedures to guide jury discretion in capital cases. No one would contend that that effort has resulted in a perfect system. But no one can deny that it is a vastly better system than the wholly ad hoc and undisciplined regime whereby jurors sentenced persons to death with no more constraint than a "mystifying cloud of words" on the extraordinarily elusive concept of premeditation. See B. Cardozo, *Law and Literature*, 101 (1931). Thus, although there is deep disagreement about whether death penalty laws are good enough, there can be no serious dispute that they are much better. That improvement resulted from this Court's willingness to insist that legislatures play a more meaningful role in specifying the criteria for capital punishment. Similarly, we urge this Court to insist that legislatures play a more meaningful role in specifying the criteria for punitive damages.

In summary, standardless punishment means not only arbitrary and capricious punishment, but often illicit reliance on inappropriate criteria of punishment. Legislative specification of appropriate standards for decision is a meaningful step toward achieving the kind of regularity and consistency that comports with due process of

law. The burden on this Court will be substantially lessened by this approach, since the Court can review such statutes generically under a more lenient standard of review.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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